APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2503

DEBORAH KATZ PUESCHEL,
Plaintiff-Appellant,

v.

RODNEY SLATER, SECRETARY,
DEPARTMENT OF TRANSPORTATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Robert E. Payne, District Judge.
(CA-97-148-A)

Argued: September 22, 1998
Decided: February 18, 1999

Before WILKINS and MICHAEL, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

OPINION

PER CURIAM:

Deborah Katz Pueschel appeals the district court's grant of summary judgment in favor of the Department of Transportation in her action alleging discrimination in violation of Title VII, 42 U.S.C.A. § 2000e et seq. (West 1994 & Supp. 1998) and the Rehabilitation Act, 29 U.S.C.A. § 791 et seq. (West 1999). We affirm.

I

The facts, very briefly put forth in the light most favorable to Pueschel, are these. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Pueschel, an air traffic controller employed by the Federal Aviation Administration (FAA), suffers from sarcoidosis and asthma, conditions made worse by stress. Pueschel has filed claims with the federal Office of Workers' Compensation Programs (OWCP) in connection with these ailments. Her condition further requires that she work a regular schedule, an arrangement not typically afforded to air traffic controllers. In 1993, a team of FAA and air traffic controllers' union representatives proposed that Pueschel change the hours of her shift. A discussion of her schedule induced a stress-related episode on April 5, 1994, requiring Pueschel to leave work. She has not worked at the FAA since.

II

Pueschel alleges that the FAA discriminated against her on the basis of her sex and disability in violation of Title VII and the Rehabilitation Act. More specifically, she alleges that her supervisor engaged in discriminatory behavior and that the FAA destroyed her personnel records; interfered with her OWCP claims; and discriminated against her by proposing to change her work schedule.

We review a grant of summary judgment de novo. *See Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 196 (4th Cir. 1997). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding whether there is a genuine issue of material fact and whether the Department of Transportation is entitled to judgment as a matter of law, Pueschel's evidence is to be believed, and all justifiable inferences are to be drawn in her favor. *See Anderson*, 477 U.S. at 255.

Before Pueschel can succeed in her Title VII action, the statute requires that she demonstrate that there has been discrimination in respect of a "personnel action." 42 U.S.C.A. § 2000e-16(a) (West Supp. 1998). We have defined a personnel action as an employment action that is ultimate in nature, such as hiring, firing, or promoting; contrasted are interlocutory or immediate decisions. *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). The district court properly asked under *Page* whether an "adverse employment action" occurred, and held that the FAA had taken no such action.

At oral argument, Pueschel contended that the district court erred in applying *Page*, because of Supreme Court decisions that had not been announced at the time the district court ruled. In two Title VII decisions, the Supreme Court asked whether the employer took "tangible" employment action against the employee. *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2265, 2268-69 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2293 (1998). "A tangible employment action constitutes

a significant change in employment status . . . ." *Burlington Industries*, 118 S.Ct. at 2268.

In Pueschel's case, the choice of nomenclature makes no material difference in outcome. The FAA's actions did not rise to the level contemplated by either *Burlington Industries* or *Page*. The evidence clearly indicates that Pueschel's personnel records were never destroyed. There is no indication that the FAA obstructed her ability to file claims with the OWCP, and no evidence that her supervisor discriminated against her. The FAA and her supervisor merely required Pueschel to document her claims. Finally, Pueschel concedes that her work schedule was still a matter of discussion between the FAA, the air traffic controllers' union, and herself. This unrealized proposal to Pueschel's work schedule was neither a significant change to her employment status, nor was it an adverse personnel action. *See Burlington Industries*, 118 S.Ct. at 2268; *Page*, 645 F.2d at 233. The FAA is entitled to summary judgment on the Title VII claim.

III

Pueschel also challenges the district court's grant of summary judgment on her Rehabilitation Act claim. In order to establish a prima facie violation of the Rehabilitation Act, Pueschel must prove: (1) that she has a disability; (2) that she is otherwise qualified for the employment or benefit in question; and (3) that she was excluded from the employment or benefit due to discrimination solely on the basis of the disability. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995).

The district court assumed for summary judgment purposes that Pueschel's health condition constitutes a disability under the Rehabilitation Act, and without decid-

ing, we shall do the same. Pueschel contends that the district court erred in finding that she was not a qualified individual under the Rehabilitation Act. Equal Employment Opportunity Commission regulations define a "qualified individual with handicaps" as a person who, "with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ." 29 CFR § 1614.203(a)(6) (1997).

It is uncontradicted that Pueschel's physician wrote on April 6, 1994, that until further notice, Pueschel's medical condition precluded her from working. Pueschel has not worked for the FAA since April 5, 1994, and has not provided the FAA with notice of her availability to work. The evidence establishes that at the time Pueschel brought the action and throughout the litigation, her illness precluded her from working as an air traffic controller. Consequently, the Rehabilitation Act imposes no liability on the Department of Transportation. In short, she is not "otherwise qualified for employment." *Doe*, 50 F.3d at 1265; 29 CFR § 1614.203(a)(6).

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AEXANDRIA DIVISION

Civil Action No. 97-148-A

DEBORAH KATZ PUESCHEL,
Plaintiff,

vs.

RODNEY SLATER,
Secretary of Transportation,
Defendant.

Alexandria, Virginia
August 27, 1997

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

* * * *

[60] THE COURT: All right, thank you.

The complaint here recites essentially five constituent elements of claims that are alleged to be the basis for a discrimination claim under Title VII and Rehabilitation Act claims under the Rehabilitation Act. The first of those events is what is referred to in the papers here as claim No. 1, inclusion of medical information in the file

of the plaintiff, but that has been withdrawn, as it certainly should have been, because it was absolutely meritless to be in there in the first place.

There are two lines of attack with respect to the remaining claims. The remaining claims are the alleged destruction of plaintiff's records. The next one is the assignment of Mr. Becker as the plaintiff's supervisor. The next one is a shift assignment, and the final one is alleged obstruction of OWCP claims.

As to claim No. 2, the alleged destruction of plaintiff's records, claim No. 3, the assignment of Mr. Becker as plaintiff's supervisor, and claim No. 5, the obstruction of OWCP claims, the government seeks to have that dismissed under summary judgment for failure to satisfy the mandatory requirements of 29 C.F.R. Section 1614.05 (a)(1). It gets to a rule 56 posture [61] because it was articulated as a failure to state a claim issue under 12(b) —pursuant to Federal Rule of Civil Procedure 12(b)(6), but there was matter outside of the record which was added to that motion, and it therefore is to be treated as a motion under rule 56 for summary judgment.

Now the party seeking summary judgment bears the responsibility of informing the court of the basis for its motion and establishing on the basis of the record that there isn't any genuine issue of material fact and that that party is entitled to judgment as a matter of law. Once initial showing is made under rule 56(c), the burden of production but not persuasion moves to the non-moving party, and the non-moving party must go beyond the pleadings and by citing its own affidavits or depositions, pleadings, or evidence, must show there's a genuine issue for trial.

When the moving party has, in fact, carried its burden, the opponent has to do more than simply show there's

some metaphysical doubt as to the existence of material facts, and indeed, the mere existence of some alleged factual dispute doesn't defeat an otherwise properly supported motion for summary judgment, because the issue is whether there's a genuine issue of material fact, not just a dispute.

The non-moving party, of course, need only present evidence from which a jury might return a verdict in favor of the non-moving party, and if the non-moving party does that, then [62] there's no genuine issue—then there is a genuine issue of fact that necessitates a trial, and of course, it's not the responsibility of the district court to weigh the evidence, but to determine whether there's an issue for trial, and there is no issue for trial unless there's sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.

Hence, summary judgment is appropriate if the evidence is merely colorable or not significantly probative. And the evidence of the non-movant, of course, is to be believed, and all justifiable inferences have to be drawn in favor of the non-moving party.

Now with respect to the question of timeliness, the regulation here, 29 C.F.R. Section 1614.105(a), provides, and I quote, "Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap must consult a counselor prior to filing a complaint in order to try to informally resolve the matter." Subsection (1) of that section says, "An aggrieved person must initiate contact," that is, consult a counselor, must initiate contact "with a counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action."

The government says that wasn't done here with respect to the alleged destruction of records, with respect to the [63] assignment of Mr. Becker as a supervisor, and with respect to the alleged mishandling or obstruction of the OWCP claims.

The fact is there is not any evidence in the record that shows that the existence of a contact within 45 days after October 30, when Ms. Pueschel was told that—October 30, 1993, was told that her records had been destroyed. However, there's an affidavit here in which she says she talked to Mr. Becker—I mean Mr. Yeck, excuse me, on November 1, 1993, and she says she talked to him with respect to not only the destruction of her records, but also with respect to the obstruction of the OWCP claims, which she contends was actually culminated in the destruction of the records referred to in claim No. 2.

Now if the jury were to believe her testimony, then she made a contact within the time period prescribed by 1614.105, so there is a material factual dispute with respect to the question of timeliness on the alleged destruction of the plaintiff's records and whether that was reported to a counselor within the time required by the regulation, as well as the obstruction of the OWCP claims.

The plaintiff has brought forward no evidence whatsoever to suggest remotely that she in any way complained of or raised that issue, the issue of Mr. Becker's assignment, in a timely fashion. He was appointed her supervisor in May of 1993, and she first complained about all of that on April 20, 1994, to the counselor, and I think that it's her responsibility to come [64] forward with something, and what's clear beyond any serious question here is that her reply here didn't raise an issue, a triable issue in response to the showing made by the government

as to the assignment of Mr. Becker as her supervisor, and so the government is entitled to summary judgment on that aspect of her claim on that theory.

The government suggests that that ruling opens the door to allowing people to make complaints and then not pursuing them, and I think the government is correct; it does. The fault there, however, is not with the grieving party. It's with the regulations which allow such looseness to be pursued.

I am sympathetic with the situation in which Mr. Yeck found himself. From the undisputed record here, it is quite clear that Ms. Pueschel was a frequent visitor to his office, and it was, as is suggested, very difficult to determine whether she was lodging a complaint under 1614-.105 or whether she was complaining in the general sense of the word.

Unfortunately, the way these regulations are written, it was up to Mr. Yeck to assume that she was making a contact and an act within the time frames required and give her notice under subsection (d) that there wasn't going to be anything done or there wasn't anything to it or that he didn't consider it as a complaint. It's unfortunate that the regulations are written in that way, but that is a result of the regulations, and this Court certainly has no power to reconfigure those regulations.

[65] That brings me then to the substance of the Title VII aspects of the claims of Ms. Pueschel on the alleged destruction of her records, that's what's referred to in these papers as claim 2 or allegation 2; as to the assignment of Mr. Becker as her supervisor, claim 3, and I'm going to make an alternative ruling on that; on the shift assignment, claim 4; and on the merits of the obstruction of the OWCP, that's referred to as claim 5 in this package.

Now to prevail under Title VII, Pueschel must prove that she's a member of a protected claim, that she was affected by an adverse personnel action, and that the circumstances of the action give rise to an inference of unlawful discrimination. If she's successful in doing that, the burden then shifts to the government to rebut the presumption by producing evidence that its actions were based on legitimate and nondiscriminatory reasons.

If the plaintiff—excuse me, if the defendant does that, then the presumption in favor of the plaintiff is destroyed, and in that instance, the burden, it is incumbent upon the plaintiff to show that the reason given was pretext; that is, she must show that it was false and that discrimination was the real reason for the challenged personnel action. That analysis applies to claims of retaliation as well.

Now the government asserts that none of these actions here constitute adverse personnel actions. The law in this [66] circuit on that topic is *Page v. Bolger*, 645 P.2d 227. It is also augmented by decisions in Maryland recently, Caussaed or "Caussaed," C-a-u-s-s-a-e-d, v. Brown, a 924 F.Supp. 693, a 1996 decision; and it was affirmed by an unpublished decision of the Supreme Court—I mean, of the Fourth Circuit in February of 1997 on the reasoning of the district court. Also instructive on that point is the decision in *Howze v. Virginia Polytechnic* and *Green v. Fairfax County School Board.*

In *Page v. Bolger*, the Fourth Circuit held that under the statute here at issue, which is section 717, the question is whether there's been discrimination in respect of personnel actions affecting covered employees or applicants for employment, and that court noted that the issue there has been focused on ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and

compensating, and that that's what's contemplated by the term "personnel actions."

The Fourth Circuit also said that it was not supplying a general test for defining what were, as it referred to, ultimate employment decisions, which should be held directly covered by section 717 and comparable antidiscrimination provisions of Title VII. It did note that among the myriad decisions being taken at all levels and with various degrees of significance in employment contexts, there were certain other kinds of decisions other than the kind they referred to that would constitute personnel acions or adverse personnel actions [67] or ultimate employment decisions within the meaning of its holding in *Page*.

It also observed that on the other hand (there were many interlocutory or immediate decisions, in the words of the court, that had no immediate effect upon employment conditions which were not intended to fall within the direct prescriptions of section 717 as adverse personnel actions, as well as comparable provisions of Title VII, and they said that the test in this circuit is to look at the circumstances and look at the immediate decisions and find out from the facts what kind of decision it was and then apply the rule.

More recently in the *Caussaed* case, it's been held in the District of Maryland in a case involving a transfer that there had to be some indication of a decrease in wage or salary, a demotion, a less-distinguished title, or material loss of benefits to make it significantly diminished material capacity responsibilities or other indices that, of course, might be unique to a particular situation which show a material adverse change in any employment situation, as opposed to a mere inconvenience or an alteration of job responsibilities.

Now applying the rule in those decisions, I recognize there's a decision such as those in *Hayes v. Shalala* from the D.C. District Court and the other cases that are referred to and cited in the *Shalala* decision that say that Hayes really shouldn't—that *Page v. Bolger* is not the law in other [68] circuits, and that may be true. I don't question Judge Friedman's analysis in *Hayes v. Shalala* with respect to whether it's the law in the D.C. Circuit, but the law that applies here is the law of the Fourth Circuit. And I, frankly, think were I confronted with the matter as a matter of initial impression, that I certainly would myself agree with the articulation of the test as established by the Fourth Circuit.

And this case is proof positive why that ought to be the case, because we have here really quite remarkable actions. There's the alleged destruction of records, which the undisputed record here is now that didn't occur. There was a miscommunication, and all of a sudden, because there was the failure to have to resolve this in the context other than litigation, it became the basis for litigation, and it wasn't an adverse personnel action at all. It was at best a miscommunication about what was the status of the plaintiff's records.

The assignment of a supervisor is not an adverse employment action. It has to be—there has to be something that happens as a consequence of the assignment of the supervisor before there's an adverse personnel action, and the plaintiff here has been unable to point to anything that happened except the possibility that Mr. Becker, who was identified as among the people who were on the team that some ten years before this assignment of him as her second-level supervisor here had been [69] involved in what was considered to be sexual harassment, that Mr. Becker told her that before getting sick leave, she had to get some information together.

Well, given her history about the amount of time she'd been off work over the years as shown in this record, there's not even anything suspect about requiring collecting medical information as a pre-condition to granting sick leave. That's not even remotely discriminatory or retaliatory.

The other thing she points to is the shift change, and I'll deal with that in a minute, but neither of those constitute actions by Becker which would constitute an adverse personnel action at all, and so her claim fails in that respect as well.

Claim 5, the obstruction of the OWCP claim, it is really quite difficult to study the record and discern truthfully fully or, excuse me, and to discern accurately what that claim is really all about, but it seems to boil down to the fact that somehow she thinks her claims over time were processed somewhat differently than those of other people, and she blames this largely upon what can accurately be described as the incompetence of some of the people processing it, notably, a Ms. Carey. If it's incompetence, that's unfortunate, but it's not discrimination.

Beyond that, the record here is, as shown by the government, that her claim, Ms. Pueschel's claim wasn't processed any differently than anybody else's, and there is no evidence of [70] any, that it was processed any differently, that her claim was processed any differently than anybody else's claim was.

In fact, what appears from the record is a right fulsome processing of her claims, and it's quite difficult for me to understand how that, there's any merit to that claim at all, and the government has carried its burden. She hadn't carried hers. So the government is entitled to summary judgment on the discrimination claim on that basis.

Now this claim about the shift harassment is an example of what I consider to be a frivolous claim. It is remarkable to me. It's frivolous in two ways. It's frivolous as a discrimination claim, and it's frivolous as a Rehabilitation Act claim.

The undisputed record here is that she was given special shift assignments from 1991 on; that in 1993 to '94, her shift was 6:00 a.m. to 4:00 p.m.; that in 1994, there was a proposed change from 8:00 a.m. to 6:00 p.m.

There was a strangely worded letter from her doctor which pressed here left the following undisputed testimony that she has to live with, and that is that there's not a thing wrong with her having a shift from 8:00 a.m. to 6:00 p.m. when he understood what it was all about. Now this was posted in November of '93, and the first thing the plaintiff did was take off for three weeks.

The people who were making the shift changes were union [71] people, and people with the FAA were involved. They gave her a chance to talk about this, and she refused even to talk to them about it and then fired off a complaint that she somehow had been discriminated against or that she hadn't been given a reasonable accommodation.

The shift change, according to the undisputed record here, did not involve any diminution of title or pay or grade or level of responsibility or under any other unique circumstances do, change any condition of employment, and therefore, it's not an adverse personnel action.

She argues that she was treated differently than Mr. Borkholder. The record is Mr. Borkholder and she both got special shifts. They got both treated the same. They didn't get treated different.

It's rather disingenuous to suggest that she had to go to the flight surgeon and he didn't, and the only reason she went to the flight surgeon was because she rejected the special treatment she was given and he accepted his, and that's a distinction without a difference.

Quite frankly, it wasn't an adverse employment action. It was an accommodation to her, because it was favorable. In fact, there's not any real difference between what happened to her in this shift assignment, and the transfer in the cases that deal with transfer as in, cited in the *Caussaed* decision certainly would lead to the same result here.

[72] Now with respect to the claim for summary judgment under the Rehabilitation Act, the plaintiff, according to *Doe v. University of Maryland Medical Systems Corp.*, has to establish to make a prima facie case a violation of the claim under the Rehabilitation Act that she has a disability within the meaning of the statute, that she is otherwise qualified for the employment, and that the FAA took action against her solely because of her disability.

Now a qualified individual with a handicap is defined in the regulations to mean an individual with handicaps who with or without reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of the individual or of others. And the government—the act, of course, requires the government, like all employers, to make reasonable accommodations to any known physical or mental limitations of a qualified employee unless it would impose an undue hardship on the agency.

Now let us assume for the moment that her medical condition constitutes a handicap under the act. Then it

would find she's not qualified for the position, because her physician stated in April 1994 that she's not been qualified to work and she's not returned to the position, and so she can't now be heard to contend that she can't return to work. She was arguing that position in the OWCP and arguing another position in this situation, and she can't have it both ways. That's not right. [73] And beyond that, not being right, it's not permissible at law.

Now the government did offer her an 8:00 a.m. to 6:00 p.m. schedule, and the record here shows that it is a reasonable accommodation on its face, because her own doctor has testified here that it was something she could do and that it's not medically necessary to change that shift once he understood what the parameters were with the appropriate times off and so forth. It modified her work schedule to stabilize her environment, and the mere fact that it didn't give her the exact schedule requested, absent some medical proof that this was absolutely necessary to continue her employment, could not rise to the level of refusing a reasonable accommodation.

More importantly, if the Rehabilitation Act is to work, the reasonable accommodation issue has to be an interactive process, and that's manifested in the regulations which so provide at 29 C.F.R. Part 1630. And what appears beyond any question in dispute here is that the plaintiff completely on her own stopped the interactive process by refusing to talk with those who were making the decisions.

And where, as here, the breakdown in the interactive process is on the plaintiff, then it is the plaintiff who bears the consequence of failing to provide the—or of the failure of the interactive process to result in what she continues to be, an accommodation that is reasonable.

That is the teaching, meaning, and holding of *Beck v. The University of Wisconsin Board of* [74] *Regents.*

As I said, this case, in my judgment, lacks merit for the reasons I've said. There isn't any way any reasonable jury could return a verdict in favor of the plaintiff on any of the theories that are being propounded under either Title VII or the Rehabilitation Act, and for that reason, the defendant's motion for summary judgment is granted, and the action will be dismissed with prejudice. An order will be issued that says for the reasons set forth on the record today, the motion is granted and the action is dismissed with prejudice.

Is there anything else that needs to be done in this case at this time?

MR. SZYBALA: No, Your Honor.

MR. CHUZI: No, Your Honor.

THE COURT: All right, we'll be in adjournment.

(Which were all the proceedings had at this time.)

APPENDIX C

[DoL Logo]

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Washington, D.C. 20210

December 10, 1998

(202) 693-0045

File Number: 25-0298151
Date of Injury: 01/01/1980
Employee: DEBORAH K. PUESCHEL
Social Security Number: 213-56-5622
Date of Birth: 01/09/1952
CSA Number:

DEBORAH K. PUESCHEL
10135 GATE PKWY APT 1907
JACKSONVILLE, FL 32246

Dear Ms. PUESCHEL:

This letter outlines your entitlement to compensation benefits and your responsibility to return to work in connection with the injury identified above.

PAYMENT OF COMPENSATION

The Office of Workers' Compensation Programs (OWCP) will pay you compensation benefits under the conditions set forth below.

Weekly rate of pay used to compute gross compensation: $1611.51

Percentage of rate of pay: 75% (one or more dependents)

Cost-of-living adjustments have increased your gross weekly compensation to: $1299.00

First Payment		Regular Payment	
For Period From	05/15/1994	For Period From	12/06/1998
To	12/05/1998	To	01/02/1998
Net Amount:	$42704.55	Gross Amount:	$5196.00
Health Benefits:	$ 0.00	Health Benefits:	$ 113.16
Basic Life Ins:	$ 0.00	Basic Life Ins:	$ 0.00
Post-Retirement		Post-Retirement	
Basic Life Ins:	$ 0.00	Basic Life Ins:	$ 0.00
Optional Life Ins:	§ 0.00	Optional Life Ins:	$ 0.00
Net Amount:	$42704.55	Net Amount:	$5082.84

If you have optional life insurance and/or health benefits coverage but no deduction for it is shown above, contact this office immediately. You are still responsible for these premiums.

US DEPT OF TRANSPORTATION
CTP: ATTN: AEA-14.1
FEDERAL AVIATION ADMIN
EASTERN REGION
JFK INTL AIRPORT
JAMAICA NY 11430

cc: George Chuzi

RECOVERY AND RETURN TO WORK

Acceptance of your claim and payment of compensation do not change your employment status with your employing agency. Unless your agency has told you otherwise, you are still its employee and subject to its personnel rules:

Compensation benefits for total disability are payable only while you cannot perform the duties of your regular job because of your injury at work. The Federal Employees' Compensation Act (FECA) is not a retirement program, and you are expected to return to work (including light duty or part-time work, if available) if you are no longer totally disabled because of your injury. The FECA provides that a partially disabled employee shall be paid compensation based on the difference between the monthly pay and the employee's wage-earning capacity, as determined by the employee's actual earnings or by the OWCP.

1. If you have not done so, ask you employing agency whether light or limited duty work is available for partially disabled employees, and whether your usual job can be changed to meet your work limitations due to the injury.

If the answer to either of these questions is yes, ask your physician whether and when you will be able to perform these duties. Once you can perform light or limited duty, you should report to your agency seeking such duty.

2. If you receive an offer of light or limited duty from your agency, advise the OWCP in writing of your decision either to accept or refuse the position offered at the time that you notify your agency. Refusal by a partially disabled employee to seek, accept, or con-

tinue suitable work is lawful grounds for the reduction or termination of compensation.

3. If the OWCP learns that you have earnings equal to or higher than the wages being paid for the job you held when injured, the OWCP will terminate your compensation benefits without notice.

OTHER IMPORTANT INFORMATION

The enclosure to this letter (EN1049) contains other important information about your compensation payments. After you have read it, sign one copy of the certification and send it to this office.

If you have any questions concerning your claim, contact this office at the address or telephone number noted above.

Sincerely,

/s/ Roberta F. Mosier
ROBERTA F. MOSIER
Special Examiner

Enclosure(s): EN1049

OTHER IMPORTANT INFORMATION

Read the following information carefully, and keep it for future reference. If you have questions, contact this office at the address or telephone number shown on the front of this letter.

1. HOW COMPENSATION IS PAID. Compensation benefits are paid each four weeks. The OWCP approves the payment and the Treasury Department issues it. Your first payment will be sent within 15 days. Regular payments will be dated the last day of the four-week period for which payment is made. DO NOT file claims unless you are asked to do so.

2. DELIVERY OF PAYMENT. If you do not receive a payment within 10 days after it is due, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, your address (with ZIP code), and the amount of the payment. Your signature must appear on the letter.

3. DIRECT DEPOSIT. If you are not yet receiving your payments by electronic fund transfer (EFT or direct deposit), please so advise the OWCP. We will then send you a sign-up form for direct deposit (you may also be able to obtain one from your bank).

4. CHANGE OF ADDRESS. If you change the address used for your payments, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, the old address, and the new address (with ZIP code). Your signature must appear on the letter. Also, promptly advise the OWCP of any change in your mailing address, if different from the check address.

5. CHANGE IN STATUS OF DEPENDENT. If you have one or more dependents, and the status of any dependent changes, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, the name of dependent whose status changed, the effective date of the change, and the nature of the change in status. Your signature must appear on the letter.

If you claimed only one dependent, DO NOT CASH CHECKS RECEIVED AFTER THE CHANGE IN STATUS of this dependent. Otherwise, an overpayment of compensation may result. Return the checks promptly to this office.

6. RETIREMENT BENEFITS. You must report to the OWCP any retirement income you receive from any Federal agency. This is because a person who receives compensation benefits under the FECA is not permitted to receive benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS).

If you are covered under FERS, the OWCP must deduct from your compensation entitlement at least part of any Social Security Retirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in Social Security retirement benefits. Therefore, advise the OWCP immediately upon filing for or receiving Social Security Retirement benefits.

7. OTHER COMPENSATION AND DISABILITY BENEFITS. If you have filed for or receive other compensation or disability benefits (for example, black lung benefits or veterans' benefits) from any Federal agency, advise the OWCP of the name of the Federal agency and the nature of the disability involved.

8. RETURN TO WORK. Advise the OWCP if you return to your former job. If you obtain other work, either with your original employing agency or with another employer, submit the following information to the OWCP at once:

A. Name and address of employer

B. Date you returned to work

C. Type of work you are performing

E. Your weekly pay rate

D. Number of hours worked per week

Your pay rate should include not only cash wages, but also "wages in kind", such as housing, meals, clothing, and reimbursable expenses. If you are self-employed (for example, as a farmer or a store operator), you must report as your pay rate what it would have cost you to hire someone else to do the same work.

9. OVERPAYMENTS. To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATEY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working.

NOTICE TO EMPLOYEES COVERED BY THE CIVIL SERVICE RETIREMENT SYSTEM

Disability compensation payments under the FECA are temporary in nature. If the OWCP reduces, further reduces, or terminates your compensation payments, you may wish to elect retirement benefits in the future. In the event of your death, compensation is not payable to

your survivors unless they can establish that your death resulted from the accepted job-related medical condition.

The Office of Personnel Management (OPM) administers the Civil Service Retirement System. The OPM has asked us to remind you that *if you remove your contributions from the Retirement Fund, you lose all entitlement to a Civil Service annuity and your survivors lose all entitlement to a Civil Service survivorship annuity.*

If you have any questions about the consequenecs of taking a refund of your retirement contributions, contact the Office of Personnel Management, Compensation Group, Retirement Operations, Washington, D.C. 20415.

CERTIFICATION

I have read the information contained in EN1049 and understand the conditions under which I may receive compensation and the items I must report to the Department of Labor, Office of Workers' Compensation Programs, in connection with my claim. I agree to be bound by these conditions.

I understand that willful failure on my part to comply with these conditions can result in termination or forfeiture of benefits and liability for resulting overpayments. I also understand that any falsification or willful omission may result in criminal prosecution.

_____ _____

Signature (in ink) Date

APPENDIX D

[DoL Logo]

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers Compensation Programs
Division of Federal Employees Compensation
Washington, D.C. 20210

File Number: 25-0298151

[Sep. 23, 1998]

Deborah Katz Pueschel
10135 Gate Parkway Apt. 1907
Jacksonville, FL 32246

Dear Ms. Pueschel:

After a thorough review of your case files, compensation for leave without pay for periods after April 5, 1994 is being approved. This decision is not based upon vacating the previous denials in your April 5, 1994 injury claim, but rather, a finding that disability after that date was related to your previously approved claim under case file 25-0298151.

Accordingly, payment is being approved as follows, based on the pay rate in effect as of April 5, 1994:

Weekly rate of pay: $72,797 per annum / 52 =	$1399.94
Operational differential: $139.52 per pay period/2 =	69.76
Sunday premium pay: $174.40 per pay period/2 =	87.20
WEEKLY TOTAL	$1556.90

Your rate of pay also included holiday pay, but since this was not a regular amount, we must obtain the year prior

amount of holiday pay from your employer. After the information has been received, an adjustment will be made. Compensation is computed at ¾ of your pay rate, due to your spouse. For purposes of the past periods of compensation being claimed, please advise of the date of your marriage.

The following cost-of-living increases have been applied:

2.5% effective 3/1/96
3.3% effective 3/1/97
1.5% effective 3/1/98

Compensation for the following periods is being paid:

5/23/94 - 5/25/94	$700.61
5/29/94 - 12/24/94	$35,030.40
2/18/95	$11.68
2/19/95 - 7/19/98	$214,858.93
TOTAL:	$250,601.62

Withholdings for health benefits plan 105 have been made for the periods 5/29/94 - 12/24/94 and 2/19/95-7/19/98, bringing the net total payment to $245,346.36. You may expect to receive a check in this amount shortly.

To claim compensation for periods after 7/19/98, please complete the enclosed form CA-8 and submit it through your employer.

Your employer is being saked to clarify your pay status for the period 4/5/94 - 5/20/94, as we have conflicting information.

Claims for compensation for periods prior to 4/5/94 are still pending, as is your request for reconsideration on case file 25-438017. I will address these issues in separate correspondence.

Per our telephone conversation, a copy of the leave analysis provided by the FAA as an attachment to your February 1, 1998 CA-7 is enclosed.

Sincerely,

/s/ Roberta F. Mosier
ROBERTA F. MOSIER
Special Examiner

Enclosures

Cc: FAA
Atty Chuzi

APPENDIX E

[Excerpt from Court Transcript Dated July 7, 1997]

CROSS EXAMINATION

[33] BY MR. CHUZI:

Q Dr. Callaway, I'm just going to—I have about three questions and I just want to circle back. Mr. Szybala asked you several questions about the difference between a 6 a.m. to 4 p.m. shift and an 8 a.m. to 6 p.m. shift.

If the 8 a.m. to 6 p.m. shift involved more stress on Ms. Katz because air traffic is heavier at 6:00, would that be a factor in your assessment as to whether 6 to 4 is more or less beneficial than 8 to 6?

A I think there are two factors. One is the issue of stress and multiple evaluations by difference physicians. Everyone had urged that she reduce this as much as possible. We haven't talked about all the conditions and labels and the diagnostics—diagnoses that she had, one of which was fibromylagia which is a descriptive label, and certainly that is worse with stress. That's, you know, an issue about which I don't have first-hand information. But anything that increased stress would be more hazardous.

The other issue is the issue of changing shifts back and forth and changes by two hours in the time you get up or go to bed will have adverse affects temporarily until you readjust.

* * * *

[44] Q Well, what do you think about right now?

A I think right now she's certainly capable of work. She's probably, she's probably capable of air traffic control work right now except for the fact that believe she's still on some medication that would be disqualifying. And she's certainly capable of administrative work of any capacity.

Q She is capable of administrative work?

A I mean, I—as far as I'm concerned, none of her physical conditions right now preclude her from, from working in any capacity. She's well enough to work.

Q When, when did you reach that conclusion?

A Just now. I mean, this is the first time I've been asked.

Q Well, you said that you had been asked to write this note by Ms. Katz I take it.

A Right.

* * * *

APPENDIX F

BRIAN C. TURRISI, M.D., F.C.C.P.
Pulmonary and Internal Medicine
1601 18th Street, N.W.
Washington, D.C. 20009
(202) 667-0134

November 1, 1995

Federal Aviation Administration
U.S. Department of Transportation
852 East Market Street
Leesburg, VA 22075

Re: Deborah Katz-Pueschell

To Whom It May Concern:

I am Ms. Katz-Pueschell's internist and pulmonary specialist and I have been treating her for the last few years for sarcoidosis and asthma. I am also an aviation medical examiner who is quite familiar with the medical requirements for air traffic controllers. You have recently received correspondence from Dr. Steven J. Rojcewicz, who is Ms. Katz-Pueschell's psychiatrist. I have read his assessment of her case dated October 31, 1995, and I completely agree. Although from an objective perspective her asthma and sarcoidosis have improved to some degree, her anxiety disorder makes the reexacerbation of these disorders totally unpredictable. On this basis the patient would be medically disqualified from an aviation medical examiner's perspective for an active position as an air traffic controller.

If I can be of any further help or assistance, please do not hesitate to contact me.

Sincerely yours,

/s/ Brian C. Turrisi, M.D.
BRIAN C. TURRISI, M.D.
AME No. 16871-1
BCT/bj

APPENDIX G

BRIAN C. TURRISI, M.D.
1901 - 16TH STREET, N.W.
WASHINGTON, DC 20009
(202) 667-0134 DEA # AT 6981513

NAME Dasarah KATZ AGE

ADDRESS DATE 4/6/94

℞

Due to Physical & mental problem at the patient's Employment She is NOT released for ANY work at the time & until further notice

Refill ____ times

(Signature)

To ensure brand name dispensing, prescriber must write "Brand Necessary" on the prescription.

M7002910

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